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GENDER VIOLENCE AND THE APPLICATION OF THE MARIA DA PENHA LAW TO TRANS WOMEN IN BRAZIL

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Resumo

A temática da violência de gênero tem adquirido crescente relevância científica a despeito de ser um tradicional fenômeno empírico. Tomando como referência a violência contra a comunidade LGBTQ+, o presente ensaio realiza uma análise sobre a aplicação da Lei Maria da Penha com mulheres transexuais. Os resultados da pesquisa demonstram a existência de três ondas marginais de interpretação extensiva da Lei Maria da Penha aos casos de violência contra mulheres transexuais, a despeito de preponderar uma posição relativamente conservadora no Judiciário brasileiro.

Palavras chave: Brasil; decisões judiciais; Lei Maria da Penha; LGBTQ+; transgênero; violência de gênero.

Abstract

The theme of gender violence has acquired increasing scientific relevance despite being a traditional empirical phenomenon. Taking violence against the LGBTQ+ community as a reference, this essay analyzes the application of the Maria da Penha Law with transgender women. The research results of this article demonstrate the existence of three marginal waves of extensive interpretation of the Maria da Penha Law to cases of violence against transsexual women despite the predominance of a relatively conservative position in the Brazilian Judiciary.

Keywords: Brazil; court decisions; gender violence; LGBTQ+; Maria da Penha Law; transgender.

In Brazil gender violence continues to occupy negatively the first place in the national ranking of crimes against the person. According to the Atlas of Violence (IPEA, 2018), in 2016, 4,645 women were murdered in the country, with a rate of 4.5 homicides for every 100 thousand Brazilians, with an increase of 6.4% in ten years.

Regarding to the victims inserted in the LGBTQ+ population 130 transvestite victims, transsexual women and men were murdered in Brazil according to the National Association of Transvestites and Transsexuals - ANTRA (2018) in 2018, until October.

It can also be seen when Brazil is inserted in the international context, that it is the most lethal country for the LGBTQ+ population since it has killed about 868 transvestites and transsexuals in the last eight years, unfortunately being at the top of the ranking of countries with more records homicides of transgender people, surpassing countries that like Iran, in Saudi Arabia, consider homosexuality as a

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crime punishable by the death penalty, where in the last eight years it has registered the death of 01 person (TGEU, 2016).

According to table 01, Brazil killed almost four times more between January 2006 and June 2018 than the second most lethal country for homosexuals in the Americas, with Mexico having recorded a total of 259 individuals in the same period, still surpassing countries with great public security instability such as Venezuela and Colombia with 109 deaths each and Honduras and El Salvador with 86 and 29 deaths respectively in the last eight years.

Given this context of serious vulnerability for the LGBTQ+ population in Brazilian territory, it is clear that even with more than a decade of existence of the celebrated and idealized Maria da Penha Law (LMP) published in 2006, how is known Law Federal 11,340/2006 (BRASIL, 2006), it covers and protects only victims who are biologically considered women, or that is, female, omitting its scope for female women, which does not depend on the individual's birth gender, whether female or male, according to the present study.

Table 1 - The ten most lethal American countries for LGBTQ+ (January/2006 - June/2018)

COUNTRY	DEATHS
Brazil	868
México	259
USA	146
Colômbia	109
Venezuela	109
Honduras	86
Argentina	48
Guatemala	39
Dominican Republic	36
El Salvador	29

Source: Authors' elaboration: Based on TGEU (2016).

First, there is an urgent need to clarify that not only female women are vulnerable individuals in Brazilian society, such as, for example, people with disabilities, the elderly, the LGBTQ+ population, children and adolescents and the homeless. As the Maria da Penha Law (LMP) when citing the term "woman" 70 times and citing only 05 times the term "gender" always referring to women, it is concluded that the object of its protection is the female sex (biological issues) and not the female gender



(social/psychological issue), thus lacking specific legislation for trans people that the elderly, children and adolescents have specific legislation.

The homosexual movement began to organize itself in Brazil in 1978 with the founding of Somos - Grupo de Afirmação Homossexual, in São Paulo, and with the publication of the newspaper *Lampião da Esquina*, in Rio de Janeiro, but in the early 1980s, the movement suffered a setback due to political divergences and the AIDS epidemic, resuming the growth of the movement in the first half of the 1990s (FACCHINI, 2003). The issue of sexuality has been the result of studies in both the field of medicine and criminality. Until 1993 homosexuality was treated by the World Health Organization - WHO as a disease that needed to be treated and cured. According to Mott (2006):

“For decades, modern, solid international multidisciplinary research has ensured that “homosexuality is not a disease, disorder or perversion”. In 1970 the American Psychology Association, since 1985 our Federal Council of Medicine and since 1993 the World Health Organization have excluded the code 302.0 of the International Classification of Diseases, leaving homosexuality to be considered “deviation and sexual disorder”. In 1999 it was the turn of the Federal Council of Psychology to promulgate a report ratifying the normality of homosexuality, at a time that condemned homophobic theories and therapies. Such resolutions, moreover, ratify what Freud already in 1935 wrote in the famous Letter to an American mother: “Homosexuality is neither addiction nor degradation. It cannot be classified as a disease”. And even more: the depatologization of homosexuality refers directly to the defense of the human rights of sexual minorities, just as, in 1984, the Brazilian Psychiatric Association and its affiliates passed a resolution” (MOTT, 2006, p. 510).

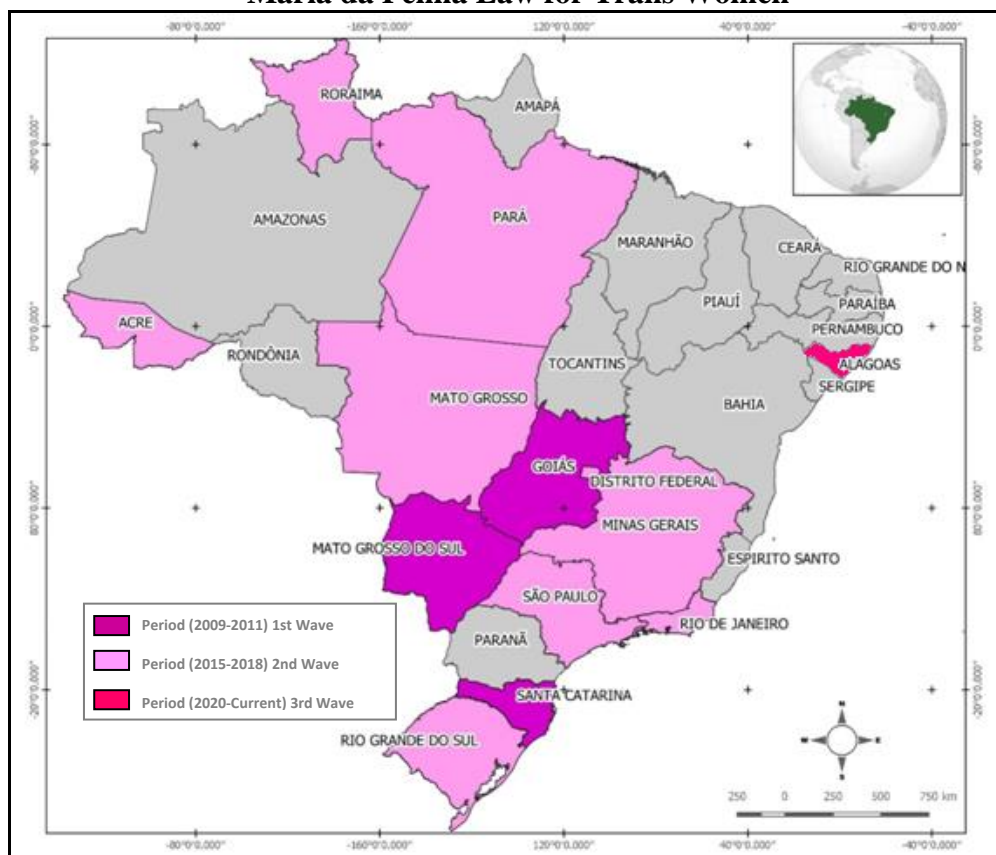
Currently, the Ministry of Human Rights through Dial 100 of Brazil receives complaints at national level about violence committed against victims of the LGBTQ+ community, and although there is also a civil society organization about the movement, it is clear that in the country there is no specific criminal legislation for the punishment of transphobic crimes, which are punished under the light of the Brazilian Penal Code or by the extensive interpretation of specific laws (SENHORAS, 2018).

Under the aegis of Article 2 of the Maria da Penha Law (LPM), as Federal Law 11,340/2006 is known (BRAZIL, 2006), where every woman, regardless of sexual orientation, deserves to live without violence, this article analyzes the application of the LMP in order to include the transsexual population and female transvestites, vulnerable stakeholders in the scope of domestic violence, thus arising the need to expand the application of the LMP to specific cases, when the use of the term female gender is enlarged in relation to the perspective of the term female sex.

According to map 1, it was found that until 2018, according to data from the Judiciary, only twelve Brazilian states had widely interpreted the reach of the PML in relation to transvestite or transsexual women victims of domestic violence. The Federal District and the state of Roraima were the last federative entities until then. In Roraima, this positioning occurred due to the institutional demand for high violence against the LGBTQ+ population.



Map 1 - Extensive Interpretation of Maria da Penha Law for Trans Women



Source: Authors' elaboration. Based on national judicial decisions.

In Roraima due to the institutional demand for high violence against the LGBTQ+ population. Although there is an increasing extensive use in the interpretation of LMP, it was observed in the research that no court in the Northeast region applied LMP to women transsexual and transvestite victims. According to Senhoras and Senhoras (2018):

On the other hand, in view of the existing socio-cultural curbs, including in the national Judiciary, the Federal Law Project 8,032 / 2014 emerged to include in the LMP the protection for transsexuals and transvestites, although it has been stopped since August 2015, awaiting deliberation in the Constitution, Justice and Citizenship Commission (CCJC) of the Chamber, as well as the Senate Bill No. 191/2017 in process. It is concluded based on the discussions previously presented in the research that the Maria da Penha Law clearly defines that its object of protection is the female woman (biological issue), which is why new changes in the legislation are urgent as necessary, since the female gender (social construction) is out of the LPM and in view of this gap, the few proactive decisions of the Judiciary Power had a nature of politicization of the law, which makes it imperative that the Legislative Power assume its responsibility to define and harmonize the theme without any need or possibly space for extensive interpretation (SENHORAS; SENHORAS, 2018, p. 104).

Map 1 also reveals the existence of three waves of extensive interpretation of PML for trans women, the first being between the years 2009 to 2011 where only three states, Goiás, Mato Grosso do



Sul and Santa Catarina, after three years of the enactment of the Law Federal No. 11.340 / 2006, decided positively on the subject. The second wave occurs just four years after the first, in the period from 2015 to 2018, covering eight states and the Federal District, also with decisions favorable to trans women under the Maria da Penha Law.

It is also observed that the extensive interpretation of the Maria da Penha Law went beyond the issue of gender or female sex, since in 2008 and 2012 the Special Criminal Court of Unified Cuiabá determined the application of emergency protective measures in favor of a male victim threats from the former companion. A similar decision was also rendered in 2011 by the Court of Justice of Mato Grosso do Sul in favor of a male victim (NASCIMENTO, 2013).

In the first two waves evidenced in map 1 about the extensive interpretation in the interpretation of LMP, it was observed in the research that no court in the Northeast region had applied LMP to transsexual and transvestite women and only in January 2020, judge Alexandre Machado de Oliveira, from Domestic Violence Court Against Women in the municipality of Arapiraca in the state of Alagoas, decided that the Maria da Penha Law can be applied in cases of aggression against trans people, thus initiating the third wave of judges in this regard, thus inaugurating the region northeast in this type of decision (ANGELO, 2020).

.*Ex positis* it is concluded that the Maria da Penha Law is the result of the historic feminist movement and has as its object the protection of the female sex, that is, the biologically considered woman, not including the female gender (social or psychological issue) nor much less the male sex/gender, however, not preventing the extensive interpretation adopted in isolation by magistrates in the country. However, there is an urgent need to approve legislative remedies for the effective protection of other vulnerable households, such as the LGBTQ+ population, which has been systematically victimized in the country.

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